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ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

(202) 942-5000
FACSIMILE: (202) 942-5999

IRVIN B. NATHAN
(202) 942-5070

NEW YORK
DENVER
LOS ANGELES
LONDON

October 12, 2000

BY FACSIMILE AND REGULAR MAIL

Kevin A. Malone, Esq.
Krupnick, Campbell, Malone, Roselli, Buser, Slama,
Hancock, McNelis, Liberman & McKee
700 Southeast Third Avenue, Suite 100
Fort Lauderdale, Florida 33316

John J. Halloran, Jr., Esq.
Speiser Krause Nolan & Granito
34th Floor, Two Grand Central Tower
140 East 45th Street
New York, NY 10017

Re: *Department of Amazonas, et al. v. Philip Morris Companies Inc., et al.*,
00 CV 2881 (NGG) (consolidated)

Dear Kevin and John:

Based on documents that we have received following our last conference with the Court, we feel constrained to raise with the Court at the oral argument scheduled for October 13 the question of whether the retention agreements between the plaintiffs and your firms violate the ethics rules governing the practice of law in New York and require dismissal of the actions or, at the very least, disqualification of your firms.

Following our last conference in this matter, we have received copies of written retention agreements between counsel for the plaintiffs and several Departments, including the Department of Boyaca ("Boyaca"). We are advised that all of the retention agreements with the Departments are publicly available in Colombia as a matter of Colombian law. We presume and are currently checking that the retention agreements between plaintiffs' counsel and the other plaintiff Departments are substantially the same as the Boyaca agreement and the others we have obtained and reviewed.

The agreements contain at least two provisions that appear to contravene New York ethics rules, which have been incorporated into the local rules of the federal District

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Court for the Eastern District of New York, and a New York statute.¹ First, the agreements provide that your firms and your co-counsel will indemnify and hold the plaintiffs harmless for (a) any award of costs or attorneys' fees issued by the Court against the plaintiff Departments for bringing an unfounded action against the defendants and (b) for any costs incurred or judgments rendered against the plaintiffs on any counterclaims that may be brought by the defendants. *See, e.g.,* Boyaca Agreement ¶ 12. Second, the agreements provide that your firms and your co-counsel will pay and ultimately be responsible for all expenses incurred in pursuing this litigation in the event that there is no recovery from the defendants. *See, e.g.,* Boyaca Agreement ¶¶ 2, 3, 6, and 12. Both provisions violate New York ethics provisions and the state statute.

The indemnification provisions contained in these agreements stand in clear violation of New York Code of Professional Responsibility DR 5-103(A), *codified* N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.22 (1999), which prohibits a lawyer from acquiring any "proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client." *See also* Bar Ass'n Nassau County Op. 93-12 (1993) (finding that New York law prohibited proposed retainer agreement that contemplated higher than usual contingency fee but no reimbursement for expenses); ABA Model Rules of Professional Conduct 1.8(j) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client."). Indeed, the indemnification provision also appears to violate a state statute that prohibits an attorney from promising or giving "valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands . . . a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof." N.Y. Jud. Law § 488(2) (McKinney 1983). The promise of "valuable consideration," namely, insurance to pay an award of attorney's fees or the judgment on any counterclaim, in exchange for the retainer to bring the pending civil action, clearly violates this provision, which reflects the public policy of the state against champerty.²

The other provision referenced above, *i.e.*, the agreement that your firm and its co-counsel will be responsible for all costs and expenses in the absence of any recovery

¹ For that matter, the agreements appear to contravene the ABA Model Rules of Professional Conduct that have been adopted by Florida and a number of other states.

² This provision also appears to violate the ethics rules obtaining in Florida. *See* Fla. State Bar Ethics Op. 96-3 (February 15, 1997) (attorney may not ethically agree to pay fees and costs assessed against client as a sanction.)

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also conflicts with New York law. DR 5-103(B)(1) provides that "[w]hile representing a client in connection with contemplated or pending litigation, a lawyer may advance or guarantee the expenses of litigation, a lawyer shall not advance or guarantee financial assistance to the client." While a lawyer may advance or guarantee the expenses of litigation, any non-indigent client must remain "ultimately liable for such expenses." *Id.*

Inasmuch as the provisions of the New York Code of Professional Responsibility cited above apply to cases pending in the United States District Court for the Eastern District of New York, we believe that we are under an obligation to raise these violations of New York law with Judge Garaufis at the earliest opportunity. *See* S.D.N.Y. & E.D.N.Y. Local Civil Rule 1.3(a)(7) (admission to bar requires declaration of adherence to rules); Local Civil Rule 1.5(b)(5) (grounds for discipline).

In our view, these violations would require dismissal of these cases or, at the very least, disqualification of counsel. We believe that the retainer agreements make clear on their face that but for the provisions which appear to violate the governing ethics rules, these lawsuits may never have been brought. We invite you to provide us with any factual information or legal authority that would reflect that the retention agreements between the plaintiffs and your firms (and your co-counsel) are proper under New York law. In the absence of such a showing, we will propose that the question of the propriety of those agreements be the subject of briefing to the Court on a schedule convenient to the Court.

Sincerely,


Irvin B. Nathan

cc: Andrew B. Sacks, Esq. (By Facsimile and Regular Mail)
Ronald S. Rolfe, Esq. (By Facsimile and Regular Mail)
David M. Bernick, Esq. (By Facsimile and Regular Mail)